



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

Law of Banking and Security

DR. ZULKIFLI HASAN

25th October 2011

Week VII

Contents

- Holder of a Cheque
- Defences to a Claim on Cheque
- Collection of Cheques
- Collecting Bankers
- Paying Bankers

Holder of a cheque

- Section 2 defines what is a holder
- Payee
- Indorsee who is in possession of it/bearer
- Possessor of a cheque is not necessarily the holder.

Rights of Holder of a Cheque

- 1. Special Indorsement
- 2. Crossing a cheque
- 3. Duplication of Cheque
- 4. presentation
- 5. Negotiation
- 6. Notice of dishonour
- 7. Right of action

Holder in Due Course

- A person to whom a bill has been negotiated.
- HIDC may get a better title than the person from whom he took.
- S 29- Requirement:-
 - 1. He must be a holder
 - 2. Complete and regular
 - 3. Before overdue
 - 4. No notice of dishonour- Normally dishonoured cheque has some answer written on it.
 - 5. For value- debt or liability
 - 6. Must be negotiated- the original payee cannot be a HIDC.
 - 7. In good faith
 - 8. No notice of defective title

Defence to a claim on cheque

- Consideration- necessary for enforceability of contract.
- A promisee who sues on an oral undertaking of another person/ written undertaking, will be unable to enforce, unless he gave consideration
- *Quid pro quo*- in return for the promise
- An act/forbearance on the part of the promisee

Defences

1. No notice of dishonour: Must be given within a reasonable time.
 - Reside in the same place: on the day after the dishonour
 - In different places: on the day after the dishonour or a post at a convenient hour on that day or the next day post thereafter
2. Defendant's contractual incapacity- minority and mental incapacity
3. Cheque incomplete when signed
4. Cheque delivered upon a condition- Section 21(2)(b)
5. Forged signature

Forged Signature

- Forged signature: Section 24- differences between forged signature and unauthorised signature
- Forgery: The act of making false document in order that it may pass of be used as genuine.
- Effect:
 - 1. the forged or unauthorised signature is wholly inoperative
 - 2. no right to retain the cheque
 - 3. no right to enforce payment
- *Robinson v Midland Bank [1925] 41 TLR 170-*
unauthorised signature will amount to forgery

Duty to Prevent Fraud

- **Greenwood v Martins Bank Ltd [1933] AC 51**
 - A husband had discovered that his wife had forged his signature as drawer to several cheques on his account with the DT. He did not immediately inform the bank. He decided to do so at a later date when discovered that his wife had been untruthful.
 - The H was under duty to inform the bank. The operation of the legal doctrine of estoppel.

Duty to Prevent Fraud

- *Public Bank Bhd v Anuar Hong & Ong* [2005] 1 CLJ 289
- The Pt, a legal firm-2 accounts CA and OA with the B. The Dt's account clerk forged the signature of the Pt's cheques totalling RM19k. The clerk was convicted for CBT. The judgment in favour of the Pt. Appeal
- Appeal allowed: 1. Cheques were honoured in the ordinary course of business and in good faith
- 2. failing to notify the dt promptly
- 3. the pt was negligent in failing to verify its monthly current account statements and to monitor its cheques books.

Bank Must Be held fully liable

- *Syarikat Perkapalan Timor v United Malayan Banking Corporation* [1982] 2 MLJ 193
 - The Pt sued the B for wrongful debiting of their account- 5 cheques totalling RM248,103.97. New cheque book. The bank could not produce any application for a new cheque book.
 - No negligence on the part of the Pt. Bank must be held fully liable.
- *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 mlj 218
 - A forged cheque is wholly inoperative

Defences to Bankers

- S 73A: This section is limited help to bankers who pay out forged cheques as it practically extremely difficult to prove that forgery is contributed by customer's negligence/ customer knew about the forgery.
- Bankers should know their customer's signatures and to verify customer's signature with care and prudence.
- Alterations: Association of Banks in Malaysia will **not** honour cheques containing alterations and it has the duty not to inform its customers.

Material Alteration

- *Ung Eng Huat & Anor v Arab Malaysian Bank Bhd* [2003] 3 CLJ 624
- The bank had the power not to pay on a cheque which contained an alteration.
- The B has the right to dishonour the altered cheque
- The bank not duty-bound to inform its customer of the alteration.

Collection of Cheques

- Clearing system has been devised
- Cheques to be taken or sent to clearing centres where cheques are sorted and despatched to drawee banks.

Collecting banker's duties

- Collecting banker- The banker to whom a holder of a cheque presents the cheque for the credit of his account is called collecting banker.
- Duties: -
 - 1. Using reasonable care and diligence in presenting and securing payment
 - 2. Give prompt notice to its customers if cheque paid by him for the credit of his account/cashed for him by the bank are dishonoured

Claims against Collecting Bankers

- A person whose cheque has been stolen or forged has a valid claim against the wrong-doer but the wrong-doers often disappear. He then may claim from the collecting bankers.
- Two types of claims:
 - Claims at common law: damages for the tort of conversion (a wrong committed by dealing a person's goods constituting an unjustifiable denial of his rights in them).
 - Claim in equity: as constructive trustee, commits a breach of trust.

Defence of Collecting Banker

- The duty of the Collecting banker is to collect the amount stated in the cheque from the drawer's bank (the paying bank)
- A collecting banker is liable to his customer for breach of contract e.g where he fails to collect when instructed to do so.
- Liable to true owner for wrongful conversion
- When a claim is brought against the collecting banker on the ground that the proceeds of a cheque for someone who is not entitled to it, the most common defence pleaded is
 - 1. section 85 of the BOE.
 - 2. Estoppel
 - 3. Contributory negligence
 - 4. Ex turpi causa non oritur action

Section 85

- A banker is not liable if
- Section 85(1) (a)-(b)- banker in good faith (refer S 95) and without negligence
- (a) receive payment for a customer in an instrument w/c this section applies
- (b) having credited a customer's account of such an instrument receives payment for himself
- S 85(2) (a)-(b)- cheques, (b) any docs issued by a customer of a banker- thought not BOE, but enable a person to obtain payment from that banker

Good faith

- If it is done honestly
- If the Banker knew that the customer's title to the cheque was defective- no protection under s 85

Negligence

- The onus of proving is upon the bank
- 2 test to determine:-
 - 1. The 'Ordinary Practice of Bankers'
 - *Commissioners of State Savings Bank v Permewan, Wright & Co.*[1915] VLR 81
 - 2. The 'Protection Against Fraud'
 - *Lloyds Bank Ltd v EB Savory & Co* [1932] AC 201
 - Takes all precautions usually taken by bankers

The bank has acted in good faith

- *Asamaju Enterprises v Malayan Banking Bhd* [1996] 1 CLJ 71
- The B has credited 9 cheques (RM149, 617.17) into the account of Usahasama Enterprise. The Cheques were crossed with the words & Co and not negotiable. The cheques were indorsed by the Pt's partner who was a regular customer. The Pt sued the B for conversion.
- Held: the dt was right in crediting the cheques.
- The dt had acted in good faith and without any negligence.

Estoppel

- The pt is estopped from succeeding his claim as a result of sthing which he has said or done.
- Estoppel by representation either by 1. statement or 2. Conduct

Contributory negligence

- The pt had failed to take reasonable care.
- Lumsden & Co v London Trustee Savings Bank [1971] 1 Lloyds Rep 114
- The B was sued for damages for the conversion of certain cheques. The B had been guilty of negligence. The pt also had been negligent.
- The damages awarded to the pt were reduced by 10%.

Ex Turpi Causa Non Oritur Action

- Out of an immoral situation an action does not arise.
- *Thackwell v Barclays Bank Plc* [1986] 1 ALL ER 676
- The pt had been a party to forge the cheques.
- Held: The defences of ex turpi causa non oritur action prevented the pt from recovering in conversion because he had been a party to or had knowledge of the fraudulent act.
- If the pt had been permitted to recover the proceeds of cheques, the court would have been indirectly assisting in the commision of a crime.

Paying banker

- Where a customer draws a cheque on his banker, this banker is known as paying banker/drawee banker
- The banker has a duty to pay to the right person according to his customer's mandate.
- Statutory Protection:-
 - S 60-forged or unauthorised indorsements
 - S 80- in good faith and without negligence
 - S 82-in good faith and in the ordinary course of business

S 60

- Protection is given in Section 60 of BOE Act – forged or unauthorised indorsements
- Does not apply to forged signatures
- Applies to all cheques payable to order (whether they are crossed or not)
- No requirement of without negligence
 - E.g Danny draws a cheque on Bank X Bhd in favour of Tim, and it is stolen by Lim who forges Tim's indorsement and negotiates it to Penny who obtains payment from the bank. Now Bank Z Bhd has paid in good faith. The bank would not be prejudiced by the forgery. The bank can debit Danny's account for the amount of cheque. Under Section 60, it is not liable to Tim who is the true owner of the cheque .

S 80

- Section 80- in good faith and without negligence pays it
- limited to crossed cheques only.
- Must be without negligence

S 82

- Section 82 – cheque which is not indorsed/irregular indorsed, in good faith and in the ordinary course of business
- The B relies upon S 60 and s 80 where they have paid cheques bearing indorsements which appear to be regular but in fact have been forged.
- The B relies upon s 82 in cases where they have paid cheques bearing no indorsement or an irregular indorsement

Slingsby v District Bank Ltd [1932] 1 KB 54

- Plaintiff requested the solicitor, C, a partner in M/S Cumberbirch & Potts to draw a cheque on their account to the defendant's bank payable to M/S John Prust & Co. The cheque was drawn with a gap between the payee's name and the words 'or order'. After it was signed by the plaintiff, C inserted the words 'per Cumberbirch & Potts'. C indorsed the cheque 'Cumberbirch & Potts' and obtained payment.
- The indorsement was not in accordance with the mandate and the bank could not rely on the protection given in the BOE.

S 73A

- Forged or unauthorised drawer's signature
- The B may treat such cheques as being properly signed or authorised if it is proven that the drawer 'had knowingly or negligently' contributed to the forgery or the making of the unauthorised signature.
- *Public Bank Bhd v Anuar Hong & Ong* [2005] 1 CLJ 289
The pt was negligent in failing to verify its monthly current account statements and to monitor its cheques books.